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SUPREME COURT OF THE UNITED STATES.

No. 1,034.

AMELIA MARY TICE AND HENRY T. CHAPMAN, JR.,
ADM'RS OF ISAAC P. TICE, DEC'D,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED 9TH DECEMBER, 1878.

W. H. MOORE, PRINT, 511 ELEVENTH ST.

SUPREME COURT OF THE UNITED STATES.

No. 1,034.

AMELIA MARY TICE AND HENRY T. CHAPMAN, JR.,
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W. H. MOORE, PRINT, 511 ELEVENTH ST.

I.—PETITION.

IN THE U. S. COURT OF CLAIMS.

December Term, 1876.

No. 11,568.—Filed April 18, 1877. J. R.

AMELIA MARY TICE AND HENRY T. CHAPMAN, JR., ADMINISTRATORS OF ISAAC P. TICE, DECEASED, LATE OF THE COUNTY OF WESTCHESTER, STATE OF NEW YORK,

vs.

THE UNITED STATES.

To the Honorable Court of Claims:

Amelia Mary Tice and Henry T. Chapman, jr., administrators of Isaac P. Tice, deceased, and residents and citizens of the city and State of New York, complaining of a wrong by breach of contract, respectfully prefer their petition, as follows, to wit:

1. That they are citizens of the United States and resident in the State of New York, and that Isaac P. Tice, who died on the 9th day of November, 1875, was at the time of his death a citizen and resident of the same State.

2d. That the said Isaac P. Tice having died intestate, letters of administration were granted to your petitioners on the 31st day of January, A. D. 1876, by the Surrogate of the county of Westchester, in the State of New York, and the said letters are still in full force.

3d. That the said Isaac P. Tice, deceased, at all times bore true allegiance to the Government of the United States, and did not in any way voluntarily aid, abet or give encouragement to rebellion against the said Government, and that your petitioners have at all times also borne true allegiance to the said Government, and never in any way voluntarily aided, abetted or gave encouragement to rebellion against the United States.

4th. That no assignment or transfer of the claim hereby presented, or of any part thereof or interest therein, was made by the decedent, or has been made by your petitioners.

5th. The Secretary of the Treasury, Hon. Hugh McCulloch, having adopted and prescribed the "Tice Spirit Meter" for use in distilleries, by virtue of the power given to him by the Act of Congress of March 2, 1867, (see section 15, 14th Stat. at Large, p. 481,) the Commissioner of Internal Revenue addressed the following letter to Isaac P. Tice, the deceased, on the 17th day of April, A. D. 1867:

"TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
" *Washington, April* 17, 1867.

"SIR: The Secretary of the Treasury having decided to adopt the Meter invented by you, and to prescribe the same for use in distilleries, you are hereby directed to proceed with their construction, provided you are willing so to do upon the following conditions:

"First. Each set of meters will be tested by an officer detailed before being removed from the factory, and again after being finally connected with the distillery, and no meter will be accepted which is not found to work satisfactorily when subjected to these tests.

"Second. Public notice will be immediately given of the adoption of this meter, and all distilleries will be required to make application to the Collector, as required by the statute, and to furnish adequate security for payment of such meter in the event of its being supplied, and as soon as the number thus making application can be ascertained you will be advised.

"Third. You will proceed immediately with the construction of the first set of Meters, which shall be of such dimensions as to be suitable for use in a distillery of the medium capacity, for which it is intended to provide, and as soon as the same shall be completed and inspected, which shall be attached to a distillery to be designated by this office, and which shall be as near the place of manufacture as can be conveniently selected; and if at the end of one month from the time it is attached to the distillery there shall not have appeared sufficient reason for the Government to decline the further use of the meter or system, the meter will be accepted, and the distiller will be required to pay for the same. Pending this trial you will be at liberty to proceed with the construction of other meters, provided it is clearly understood that in the event of the failure of the experiment above required with the first meter, you shall not be entitled to any pay or to any claim upon the Government for any expenses which you may have incurred.

"Fourth. The Secretary of the Treasury holds himself at liberty at any time to adopt any improvement or modification of the meter or system, or at any time to revoke the order adopting the meter, and to discontinue their manufacture on behalf of the Government. If the first meter shall prove successful when subjected to the tests above set forth, and the Government shall subsequently revoke the adoption of the meter and order a discontinuance of proceedings, you will be paid such sum as may be determined upon, in the manner hereinafter stated, for all instruments which you may have completed, or have in process of completion, at the time of such revocation; provided that at no time shall you have more than twenty sets in process of manufacture at any one time, unless direction shall be given hereafter for the manufacture of a larger number.

"Fifth. Three competent persons shall be selected, one by the Secretary of the Treasury, one by the Commissioner of Internal Revenue, and one by yourself, who shall together examine into the actual cost of the construction of the meter, including interest on the necessary outlay and the cost of attaching the same to a distillery, and who shall also determine what amount shall be added to such cost in order to furnish a proper remuneration for the invention and manufacture of the meter. When the price of the first meter is thus determined, it shall form the basis for the price of other meters of similar capacity until such time as a re-examination shall be made, which may be done at any time at the instance of the Government or of yourself. It is understood that, in every case, the expense of transportation and of attaching and superintending the attachment of the meter will be added to the price fixed upon as at the place of manufacture.

"Sixth. If any distiller who has made application for a meter shall fail to put his distillery in operation immediately after the meter is attached, so that it will be impossible to test the meter in actual operation, or shall decline to have it affixed upon completion, he will be required to pay for the meter precisely as if it had been tested and found to work successfully. The meter will then be tested whenever the distillery commences operations, and if not found to work satisfactorily, the distiller will be compelled to suspend operations until the defect is cured at his expense.

"Very respectfully,

"E. A. ROLLINS, *Commissioner.*

"ISAAC P. TICE, Esq., *New York City.*

"Approved:

"HUGH McCULLOCH,
"*Secretary of the Treasury.*

"APRIL 18, 1867."

To these terms, as addressed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, Mr. Tice assented, and pursuant thereto proceeded with the construction and furnishing of the meters until the same was temporarily suspended by the joint resolution of Congress of February 3, 1868.

6th. On the 16th of September, 1868, the Commissioner of Internal Revenue, under the act of Congress of July 20, 1868, (see sections 2 and 3, 15th U. S. Stat. at Large, page 125,) removed the suspension and renewed the order for the construction and use of the meter, and addressed the following letter to Mr. Tice in pursuance of the same:

"TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, September 16, 1868.

"SIR: Having decided to adopt and prescribe the meter invented by you for use in distilleries, you are hereby directed to proceed with their construction, provided you are willing to do so upon the following conditions:

"First. Samples of the meters A and B, and of the single and double counter meter, will be kept, and each set of meters will be tested and compared with the sample, by an officer detailed for that purpose, before being removed from the factory, and again after being finally attached to the distillery; and if any meter, upon being so attached, shall prove to be defective in any respect, the defective part shall be replaced or a new meter furnished, without additional expense to the distiller.

"Second. Public notice will be immediately given of the adoption of the meter, and distillers will be required to procure and attach them to their distilleries as fast as they can be delivered and attached until all are supplied.

"Third. The one hundred and seventeen meters now finished will be immediately made ready for delivery, and the thirty-six now in process of manufacture will be completed as soon as possible. The manufacture of others to the number of five hundred in all is to be proceeded with as rapidly as possible, and thereafter not more than twenty sets are to be in process of construction at any one time, unless a greater number is directed by the Commissioner of Internal Revenue.

"Fourth. The Commissioner reserves to himself or his successor in office the right at any time to adopt any improvement of the meter or system, or to revoke the order adopting the meter and to direct, on the part of the Government, a discontinuance of its manufacture.

"Fifth. You are to furnish the meters in good order and condition, ready for transportation at the prices fixed by the Committee, which are as follows:

Sample Meter A,	$200.00
Sample Meter B,	250.00
Meter No. 1, Single Counter	450.00
" " Double Counter	500.00
Meter No. 2, Single Counter	600.00
" " Double Counter	650.00
Meter No. 3, Single Counter	800.00
" " Double Counter	850.00
Meter No. 4, Single Counter	1,000.00
" " Double Counter	1,050.00

"The cost of transportation and expense of attaching the same to be paid by the distiller.

"Sixth. The attachment of the meters is to be made under your direction, and also under the supervision of the officer to be detailed under the regulations; and after the final attachment and closing of the meter, the working of the overflow valve is to be tested by flooding the meters.

"Seventh. You are to report to this office at the end of each week the number of meters that have been delivered and to whom

the same were shipped, and the number on hand ready for delivery.

"Very respectfully,

"E. A. ROLLINS, *Commissioner.*

"ISAAC P. TICE, Esq., *New York, N. Y.*"

Under these directions and conditions Mr. Tice recommenced the manufacture and delivery of meters and continued to act thereunder.

7th. On the 8th of June, A. D. 1870, the following letter was addressed to Mr. Tice by the then Commissioner of Internal Revenue.

"TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,

"*Washington, June 8th,* 1870.

"SIR: The letter of the Commissioner of Internal Revenue addressed to Collectors of Internal Revenue, dated October 8th, 1869, relating to certificates of deposit for Tice Meters has been and is revoked, and the instructions and regulations in force prior to that letter, relating to the ordering and shipment of and payment for the meters invented by you and prescribed for use in distilleries, remain in force only in respect to meters heretofore delivered, and also those you may now have on hand or in process of construction, not exceeding twenty sets.

"Any regulations heretofore prescribed, addressed to you by or from this office, directing or authorizing you to construct, or to proceed with the construction of, or to furnish meters, and especially those of September 16th, 1868, are revoked except as aforesaid.

"New rules, regulations and orders have been prescribed, a copy of which is herewith enclosed, it being distinctly understood that neither the Government of the United States nor any department or officer thereof is or will be responsible for or on account of any spirit meters or the attachment or adjustment thereof.

"Very respectfully,

"C. DELANO, *Commissioner.*

"ISAAC P. TICE, Esq.,

"314 *3d Avenue, New York City.*"

Under the letter of the Commissioner last above quoted, the manufacture and attachment of Meters was continued by Mr. Tice until June 8, 1871, when the use of the Meter was discontinued by the order of the Commissioner of Internal Revenue in official "Circular No. 96." (For this Circular in full see Exhibit A, in Appendix.)

8th. On the 12th of April, 1873, Isaac P. Tice, the inventor and manufacturer of Spirit Meters, and to whom the preceding official letters were addressed, filed the following bill or claim for Meters on hand at the date of discontinuance of their use, and in accord-

ance with the terms of his contract with the United States as above set forth:

"*Amended Bill of Spirit Meters.*

"WASHINGTON, D. C., *April* 12, 1873.

"The U. S. Office of Internal Revenue,

To Isaac P. Tice, Dr.

	For Meters on hand—			
To	6 No. 2 Spirit Meters	at $600		$3,600 00
"	8 No. 3 " "	at 800		6,400 00
"	15 No. 4 " "	at 1,000		15,000 00
"	Storage of said Meters from June 8, 1871, to April 8th, 1873, at $400 per annum			733 33
				$25,733 33

"Received payment,

"ISAAC P. TICE."

"Sworn and subscribed before me this 12th day of April, 1873.

"T. J. GARDNER, *J. P.*"

On the same day the Commissioner of Internal Revenue approved the bill or claim of Mr. Tice, and endorsed his approval on the same, as follows:

"April 12, 1873, approved for ($25,733.33) twenty-five thousand seven hundred and thirty-three and 33-100 dollars.

"J. W. DOUGLASS, *Commissioner.*"

On the same day the bill, approved as above, was referred to the Secretary of the Treasury for his action.

The bill has never been paid by the Government, nor any portion of it, and is still due in full. The bill when filed was marked receipted, in accordance with the rules and custom of the Treasury Department, but had not been paid.

9th. The system of Spirit Meters, as invented by Mr. Tice and adopted and prescribed by the officers of the Government, "involved the use of *two Meters*," so that two Meters constituted what was known as a "set" for one distillery, and was so announced in the official instructions of the Department, and so used by the distillery. The bill or claim of Mr. Tice, as above given, is for *fourteen and one-half sets* (14½) of Meters only when thus understood.

10. At the date of the discontinuance of the use of the Meters, by the order of the Commissioner, Mr. Tice had on hand at his manufactory in New York city the fourteen and one-half sets of Meters, for which he claimed pay, and which he was obliged to store, and did keep stored, until the 8th day of April, 1873, and subsequently thereto, at great expense and trouble to him. For this he claimed storage at the rate of four hundred dollars per annum, as presented in his claim, and allowed by the Commissioner of Internal Revenue.

(For reference to the several Acts of Congress, and the various published and official regulations prescribed by the Secretary of the Treasury and the Commissioner of Internal Revenue, in connection with the adoption and use of the Tice Spirit Meter, see Appendix to this petition.)

Your petitioners therefore aver, as the legal representatives of Isaac P. Tice, deceased, that they are entitled to receive from the United States the following sums, respectively, to wit: $3,600.00 for six (being three sets) No. 2 Spirit Meters, at $600 per Meter; $6,400.00 for eight (being four sets) No. 3 Spirit Meters, at $800 per Meter; and $15,000.00 for fifteen (being seven and one-half sets) No. 4 Spirit Meters, at $1,000 per Meter. Also, for the sum of $733.33 storage on the said fourteen and one-half sets of Meters from the 8th of June, 1871, until the 8th of April, 1873—in all, the full sum of ($25,733.33) twenty-five thousand seven hundred and thirty-three and 33-100 dollars.

Wherefore your petitioners ask judgment for $25,733.33, with interest thereon from the 12th of April, 1873.

AMELIA M. TICE,
HENRY T. CHAPMAN, JR.,
Administrators of Isaac P. Tice, deceased, Petitioners.

J. W. DOUGLASS,
Attorney for Claimants, Washington, D. C.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss.*

Personally appeared before me, the subscriber, a Commissioner of the United States in and for the District aforesaid, Amelia Mary Tice and Henry T. Chapman, jr., administrators of the estate of Isaac P. Tice, deceased, to me personally known, who made oath in due form and according to law that the statements made in the foregoing petition are true; that no assignment or transfer of the claim as therein set forth, or any portion thereof, or any interest therein, has ever been made.

Witness my hand and seal this 16th day of April, 1877.

[SEAL.] EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

APPENDIX.

EXHIBIT A.

"*Circular No. 96.*

"*Discontinuing the Use of the Tice Spirit Meter.*

"TREASURY DEPT., OFFICE OF INTERNAL REVENUE,
Washington, June 8, 1871.

"Under authority conferred by sections 2 and 3 of the Act of July 20, 1868, the Commissioner of Internal Revenue, in Circular

No. 69, dated September 16, 1868, and again in Regulations, "Series 5, No. 5," date June 7, 1870, adopted and prescribed for use in distilleries, Spirit Meters invented by Mr. Isaac P. Tice, the same having been adopted and prescribed by the Hon. Secretary of the Treasury on the 19th day of April, 1867, and subsequently recommended for use by the Commission appointed under the joint resolution of Congress approved February 3, 1868.

"It having been ascertained by experience that these Meters as a class do not fully answer the purpose for which they were intended their use is hereby discontinued, and all existing orders prescribing the same are hereby revoked. All Meters attached to distilleries may be detached.

"The Meters being the property of distillers, they will be permitted to dispose of them as they may desire.

"A. PLEASONTON,
"*Commissioner.*"

Acts of Congress relating to Spirit Meters.

Act of July 1, 1862,	Section	42,	Stat. at	Large,	page	51.
" June 30, 1864,	"	56,	"	"	"	205.
" July 13, 1866,	"	118,	"	"	"	527.
" July 13, 1866,	"	33,	"	"	"	676.
" March 2, 1867,	"	15,	"	"	"	481.
Joint Resolution, February 3, 1868,					"	246–'7.
Act of July 20, 1868, Secs. 2 and 3, Stat. at L.,					"	881.

Department Regulations.

Internal Revenue,	"Special No. 54."
" "	"Circular No. 63."
" "	"Circular No. 69."
" "	"Special No. 65."
" "	"Series 4, No. 5."
" "	"Series 5, No. 5."
" "	"Circular No. 96."

II.—TRAVERSE.

Filed April 27, 1877.

And now comes the Attorney-General on behalf of the United States, and makes answer to the petition of the claimant herein, and not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of twenty-five thousand seven hundred and thirty-three dollars and

thirty-three cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

THOMAS SIMONS,
Ass't Attorney-General.

III.—FINDINGS OF FACT AND CONCLUSION OF LAW.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. Isaac P. Tice, a citizen of the United States during all the transactions herein referred to, died on the 9th of November, 1875, and the complainants were duly appointed to administer upon his estate.

II. On the 17th of April, 1867, the following letter was addressed by the Commissioner of Internal Revenue to the said Isaac P. Tice, by authority of the Secretary of the Treasuary:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, April 17, 1867.

SIR: The Secretary of the Treasury having decided to adopt the meter invented by you, and to prescribe the same for use in the distelleries, you are hereby directed to proceed with the construction, provided you are willing to do so upon the following conditions:

First. Each set of meters will be tested by an officer detailed for the purpose, before being removed from the factory, and again after being finally connected with the distillery, and no meter will be accepted which is not found to work satisfactorily when subjected to these tests.

Second. Public notice will be immediately given of the adoption of this meter, and distillers will be required to make application to the collector as required by the statute, and to furnish adequate security for payment for such meter in the event of its being supplied; and as soon as the number thus making application can be ascertained you shall be advised.

Third. You will proceed immediately with the construction of the first set of meters, which shall be of such dimensions as to be suitable for use in a distillery of the medium capacity, for which it is intended to provide, and as soon as the same shall be completed and inspected, which shall be attached to a distillery to be

designated by this office, and which shall be as near the place of manufacture as can be conveniently selected; and if at the end of one month from the time it is attached to the distillery there shall not have appeared sufficient reason for the government to decline the further use of the meter or system, the meter will be accepted and the distiller will be required to pay for the same. Pending this trial you will be at liberty to proceed with the construction of other meters, provided it is clearly understood that in the event of the failure of the experiment above required with the first meter, you shall not be entitled to any pay or to any claims upon the government for any expenses which you may have incurred.

Fourth. The Secretary of the Treasury holds himself at liberty at any time to adopt any improvement or modification of the meter or system, or at any time to revoke the order adopting the meter, and to discontinue their manufacture on behalf of the government. If the first meter shall prove successful when subjected to the tests above set forth, and the government shall subsequently revoke the adoption of the meter and order a discontinuance of proceedings, you will be paid such sum as may be determined upon in the manner hereinafter stated, for all instruments which you may have completed or have in process of completion at the time of such revocation; provided, that at no time shall you have more than twenty sets in process of manufacture at any one time, unless directions shall be given hereafter for the manufacture of a larger number.

Fifth. Three competent persons shall be selected, one by the Secretary of the Treasury, one by the Commissioner of Internal Revenue, and one by yourself, who shall together examine into the actual cost of the construction of the meter, including interest on necessary outlay and the cost of attaching the same to a distillery, and who shall also determine what amount shall be added to such cost, in order to furnish a proper remuneration for the invention and manufacture of the meter. When the price of the first meter is thus determined, it shall form the basis for a price of other meters of similar capacity until such time as a re-examination shall be made, which may be done at any time at the instance either of the government or of yourself. It is understood that in every case the expense of transportation and of attaching and superintending the attachment of the meter will be added to the price fixed upon as at the place of manufacture.

Sixth. If any distiller who has made application for a meter shall fail to put his distillery in operation immediately after the meter is attached, so that it will be impossible to test the meter in actual operation or shall decline to have it affixed upon completion, he will be required to pay for the meter precisely as if it had been tested and found to work successfully. The meter will then be tested whenever the distillery commences operations, and if not

found to work satisfactorily the distiller will be compelled to suspend operations until the defect is cured at his expense.

Very respectfully,

E. A. ROLLINS, *Commissioner.*

ISAAC P. TICE, Esq., *New York City.*

Approved. H. MCCULLOCH,
Secretary of the Treasury.

APRIL 18, 1867.

III. On the 19th of April, 1867, the Commissioner of Internal Revenue issued the following circular, announcing the adoption of a meter for distilleries:

[Special No. 54.]

Announcing the adoption of a meter for distilleries.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, D. C., April 19, 1867.

Notice is hereby given that the Secretary of the Treasury has adopted and prescribed for use in distilleries a meter invented by Mr. Isaac P. Tice, of New York, and that regulations for the use of such meter will be issued in a few days.

Each collector will notify every distiller who applies to make payment of the special tax for the year ending May 1, 1868, that he will not be allowed to continue in operation after the 15th day of May unless he shall, before that time, have made application for a meter, and accompanied his application with adequate security for the payment of the necessary expense, which will probably vary, according to the size of the distillery, from $600 to $1,500.

E. A. ROLLINS, *Commissioner.*

IV. On the 26th of April, 1867, the Commissioner of Internal Revenue issued circular "Regulations for supplying distilleries with meters and securing their proper attachment," from which the following are extracts:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, April 26, 1867.

Under the fifteenth section of the act approved March 2, 1867, the Secretary of the Treasury is authorized to adopt, procure, and prescribe for use such meters or other means for ascertaining the strength and quantity of spirits subject to tax, or for the prevention or detection of frauds by distillers of spirits as he may deem necessary; and under this authority the Secretary has adopted and prescribed for use the meter, and system of attaching the same, invented by Mr. Isaac P. Tice, of New York.

The statute further provides, that whenever the Secretary of the

Treasury shall adopt and prescribe for use any meter or meters, it shall be the duty of every owner, agent, or superintendent of a distillery to make application to the collector of his district for such meter or meters, to be used in his distillery; and the same shall be furnished and attached to the distillery at the expense of the distiller, whose duty it shall be to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment, in accordance with the regulations of the Commissioner of Internal Revenue, who is further authorized to order and require such changes of or additions to distilling apparatus, connecting-pipes, pumps, or cisterns, or any machinery connected with or used in or on the distillery premises, or may require to be put on any of the stills, tubs, cisterns, pipes, or other vessels such fastenings, locks, or seals as he may deem necessary.

The system which has been adopted involves the use of a double meter at the end of the worm through which the entire product of the still will pass, the quantity of high wines being indicated upon one register and the quantity of low wines upon another. The second meter will be placed upon the doubler in such position as to register the quantity of low wines carried back to the doubler for redistillation. If the still is provided with such attachments that no low wines are produced, and the distiller is prepared to report as taxable the entire product of the still, the second meter will not be required.

Meters will be constructed of different capacities, the smallest ones being suitable for use in distilleries where the most rapid flow of spirits cannot exceed four gallons per minute, and the largest which it is now proposed to construct having a capacity for measuring forty gallons per minute, and there will be two intermediate sizes.

An arrangement has been made with the inventor, under which he undertakes to furnish the meters at prices to be determined by a committee of three persons, two of whom are to be designated by the government and one by himself. It it believed that the price of the set of instruments, when completed at the factory in New York, will be not more than six hundred dollars for each pair of the smallest capacity, and eight hundred, ten hundred, and twelve hundred dollars for pairs of the other three sizes, respectively.

* * * * * *

V. On the 16th of September, 1868, the Commissioner of Internal Revenue addressed the following letter to the said Isaac P. Tice:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, September 16, 1868.

SIR: Having decided to adopt and prescribe the meter invented by you for use in distilleries, you are hereby directed to proceed

with their construction, provided you are willing to do so upon the following conditions:

First. Samples of the meters A and B and of the single and double counter meter will be kept, and such set of meters will be tested and compared with the sample, by an officer detailed for that purpose, before being removed from the factory, and again after being finally attached to the distillery, and "if any meter upon being so attached shall prove to be defective in any respect, the defective part shall be replaced or a new meter furnished without additional expense to the distiller.

Second. Public notice will be immediately given of the adoption of the meter, and distillers will be required to procure and attach them to their distilleries as fast as they can be delivered and attached, until all are supplied.

Third. The one hundred and seventeen (117) meters now finished will be immediately made ready for delivery, and the thirty-six (36) now in process of manufacture will be completed as soon as possible. The manufacture of others, to the number of five hundred (500) in all, is to be proceeded with as rapidly as possible, and thereafter not more than twenty sets are to be in process of construction at one time, unless a greater number is directed by the Commissioner of Internal Revenue.

Fourth. The Commissioner reserves to himself, or his successor in office, the right at any time to adopt any improvement of the meter or system, or to revoke the order adopting the meter, and to direct, on the part of the government, a discontinuance of its manufacture.

Fifth. You are to furnish the meters in good order and condition ready for transportation, at the prices fixed by the committee, which are as follows:

Sample meter A	$200
Sample meter B	$250
Meter No. 1, single counter	$450
" " 1, double counter	$500
Meter No. 2, single counter	$600
double counter	$650
Meter No. 3, single counter	$800
double counter	$850
Meter No. 4, single counter	$1,000
double counter	$1,050

The cost of transportation and expense of attaching the same to be paid by the distiller.

Sixth. The attachment of the meters is to be made under your direction, and also under the supervision of the officer to be detailed under the regulations; and after the final attachment and closing of the meter, the working of the overflow-valve is to be tested by flooding the meter.

Seventh. You are to report to this office, at the end of each week,

the number of meters that have been delivered, and to whom the same were shipped, and the number on hand ready for delivery.

Very respectfully, E. A. ROLLINS,
Commissioner.

ISAAC P. TICE, Esq., *New York, N. Y.*

VI. On the 30th of March, 1869, the Commissioner of Internal Revenue issued further "Regulations and instructions relative to Tice meters," from which the following are extracts:

[Series 4, No. 5.]

Regulations and instructions relative to Tice meters.

TREASURY DEPARTMENT, OFFICE INTERNAL REVENUE,
Washington, March 30, 1869.

1. AS TO PROCURING AND ATTACHING METERS.

On the 16th of September, 1868, the Commissioner of Internal Revenue adopted and prescribed for use in distilleries the spirit-meter invented by Mr. Isaac P. Tice, of New York, being the same that was adopted and prescribed by the Hon. Secretary of the Treasury on the 19th of April, 1867, under section 15 of the Act of March 2, 1867, and subsequently recommended for use by the commission appointed under the joint resolution of Congress approved February 3, 1868.

Section 3 of the act of July 20, 1868, provides that, whenever the Commissioner of Internal Revenue shall adopt and prescribe for use any meter, every owner, agent, or superintendent of a distillery must furnish and attach, at his own expense, such meter for use at his distillery, and furnish all pipes, materials, labor, and facilities necessary to complete such attachment in accordance with the regulations of the Commissioner of Internal Revenue, who is also authorized to order and require such changes of, or additions to, the distilling apparatus, connecting pipes, pumps, or cisterns, or any machinery connected with or used in or on the distillery premises, and prescribe such fastenings, locks, and seals as he may deem necessary.

The system which has been adopted involves the use of two meters; the first will be attached to the end of the worm, and will register the entire product of the still; the second will be placed upon the doubler in such position as to register the quantity of low wines carried back to the doubler for redistillation. If the still is provided with such attachments that no low wines are discharged, and the distiller is prepared to report as taxable the entire product of the still, the second meter will not be required.

These meters are constructed of six different sizes, the prices and capacities being as follows:

Sample meter A $200
Capacity, four gallons per minute.

Sample meter B. $250
Capacity, eight gallons per minute.
These are intended for attachments to small copper stills.

Meter No. 2 ..... $600
Capacity, three gallons per minute.

Meter No. 3. ..... $800
Capacity, six gallons per minute.

Meter No. 4 ..... $1,000
Capacity, eighteen gallons per minute.

The capacity above given must be understood to be the maximum capacity per minute of each of the meters. Meter No. 1 is not now made, having been found too small for practical use; a larger size, No. 5, having a capacity of about 30 gallons per minute, is now being constructed, the price and exact capacity of which will be announced hereafter.

The meter adopted being the invention of Mr. Tice, and secured to him by letters patent, can only be made by him or under his license; and in order to guard against an unreasonable price being demanded of those who are bound by law to purchase it, the prices of the several sizes, under an arrangement made between Mr. Tice and the government, were determined by a committee, consisting of William T. Duvall, of Georgetown, D. C.; William P. Trowbridge, of New York; and S. J. Knowles, of Massachusetts, all practical and skillful machinists, two of whom were designated by the government and one by Mr. Tice, and the sums hereinbefore named are the prices agreed upon by them for the meters delivered at the place of manufacture, as stated in the report of that committee.

Under the provisions of section 3 of the act of July 20, 1868, distillers are required to procure and attach such meters, and in making their applications therefor they must state the capacity of the still in cubic feet, and its utmost possible producing capacity per minute; that is, the greatest possible quantity of spirits that will pass from the worm in that time. The producing capacity here referred to must not be confined to high wines merely, but must show the entire quantity of spirits, whether high or low wines, which can or will pass from the worm in the time specified. The attention of distillers is especially called to this point, as the discharge from the worm is not uniform, and if the meter is not of sufficient capacity to measure and pass the largest quantity which the worm will discharge it will be flooded, and its operation thereby stopped until the meter is opened and the valve again placed in working order.

The application must also show the cubic contents of the doubler, the outside diameter of the worm at its lower extremity, the height and diameter of the tank in which it is placed, and the material of which the still, doubler, and tank are constructed. The diameter of the main pipe leading from the still to the doubler, as well as of

the charging and discharging and blow-off pipes, including the pipe used for discharging the doubler, must also be given. There is also required a description of the foundations upon which the still, doubler, and condenser are respectively supported. If the still is provided with collapse valves, their number and diameter must also be stated.

This application will be made on Form 7, as heretofore prescribed, which will be furnished by the collectors of the several districts. At the time of making the application the applicant will furnish to the collector of his district a certificate of deposit in a United States depository for the amount of the price of the meter or meters, payable to the order of Mr. Tice, and the collector will certify upon such application that he has received such certificate, and forward the application to this office for transmission to Mr. Tice. And the applicant should also state the means of access to the distillery, whether by railroad, steamboat, or canal, and with what points the distillery is connected by either of these modes of communication. If there is any person carrying on the trade of coppersmith in the immediate vicinity, the collector will state the fact; and if not, he will state the distance to the nearest point at which the services of such artisan can be procured. Upon the receipt of the bill of lading, the collector will at once transmit the certificate of deposit to Mr. Tice, at his address, 314 Third avenue, New York City.

The expenses of transportation and attachment of the meters, and of any changes required to be made in the distillery, are to be paid by the distiller.

The distillers must furnish all lumber and other materials necessary for the attachment of the meter, and such workman and assistants as may be required. The attachment will be made in such manner as to intefere as little as possible with the operation of the distillery; but in case the distiller neglects promptly to provide the materials and assistance required,,or in any way attempts to delay or defeat the attachment, it will be the duty of the collector of the district to close the distillery until the meters are attached.

Where meters are being attached to several neighboring distilleries at the same time, the expenses incurred by Mr. Tice and his employés will be apportioned among the several distilleries according to the time employed in each.

* * * * * * * *

Meters will now be delivered as fast as the corrected applications are received, and the manufacturer will proceed with their attachment as fast as possible. Collectors should at once notify all distillers who have not made application to do so immediately, and will report to the Commissioner the names of such as refuse or neglect to make such application. Whenever a certificate of deposit is forwarded to Mr. Tice, the collector will report the fact to this office,

giving the amount, and the name of the distiller who made the deposit.

Where collectors deposit their collections in a depositary bank, the meter deposits will be made in such bank; but where they are required to deposit collections with an assistant treasurer or designated depository, the meter deposits will be made in some responsible bank.

* * * * * * * *

Under the provision of the law the distiller is required to furnish and attach meters at his own expense, and also to furnish all pipes, materials, labor, and facilities necessary to complete such attachment. The first duty of a distiller is, of course, to procure a meter. The manufacturer is not required to furnish the meters on credit, and ought not to be expected to do so. When he ships a meter to a distiller, in accordance with the application, the manufacturer is entitled to the pay for it. The law does not require the manufacturer to attach it, but, on the contrary, requires the distiller to attach at his own expense. Wherever changes are required in a distillery to facilitate the attachment, such changes must be made by the distiller. In order that the attachment may be made correctly and the meters properly adjusted, the manufacturer or some of his workmen are required to superintend the attachment. When a distiller is notified by the manufacturer or his agents what changes are necessary, and what materials or assistance are required, he should furnish them promptly. It will be the duty of collectors to see that they do so, and in case of any unreasonable delay to close the distilleries until the attachment is completed.

VII. On the 7th of June, 1870, the Commissioner of Internal Revenue issued further "rules, regulations, and orders relating to spirit-meters," from which the following are extracts:

[Series 5, No. 5.]

Rules, regulations, and orders relating to spirit-meters.

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, June 7, 1870.

Experience having shown that the automatic meters heretofore in use at distilleries are unnecessarily expensive, and do not so well answer the purpose for which they were designated as the cheaper and better sample meters, or automatic meters adapted for use as sample meters, and that the use of the second or "credit" meter may be beneficially dispensed with, it is hereby ordered that hereafter the use of all meters except said sample meters, or automatic meters adapted for use as sample meters, be and is discontinued; and that hereafter one meter only shall be required for each distillery, which shall be attached in such way as that all the spirits produced at such distillery, after the manufacture thereof is com-

plete, shall pass through such meter; and every owner, agent, or superintendent of a distillery is hereby required, within ninety days, to remove from his distillery the meters the use of which is hereby discontinued.

The meters known as sample meters, and the automatic meters adapted for use as sample meters, invented by Isaac P. Tice, are hereby adopted and prescribed for use at distilleries; and every owner, agent, or superintendent of a distillery is required, within ninety days, to furnish and attach, at his own expense, such meters, of proper size, construction, and capacity for use at his distillery, and to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment in accordance with these regulations.

* * * * * *

VIII. On the 8th day of June, 1870, the Commissioner of Internal Revenue addressed the following letter to the said Isaac P. Tice:

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, June 8, 1870.

SIR: The letter of the Commissioner of Internal Revenue, addressed to collectors of internal revenue, dated October 8, 1869, relating to certificates of deposit for Tice meters, has been, and is, revoked; and the instructions and regulations in force prior to that letter relating to the ordering and shipment of and payment for the meters invented by you, and prescribed for use in distilleries, remain in force only in respect to meters heretofore delivered, and also those you may now have on hand, or in process of construction, not exceeding twenty sets.

Any regulations heretofore prescribed, addressed to you by or from this office, directing or authorizing you to construct, or proceed with the construction of, or to furnish meters, and especially those of September 16, 1868, are revoked, except as aforesaid.

New rules, regulations, and orders have been prescribed, a copy of which is herewith inclosed, it being distinctly understood that neither the Government of the United States, nor any department or officer thereof, is or will be responsible for or on account of any spirit meters, or the attachment or adjustment thereof.

Very respectfully,

C. DELANO, *Commissioner.*

To I. P. TICE, Esq.,
New York City.

IX. On the 8th day of June, 1871, the following circular, discontinuing the use of the Tice spirit-meter, was issued by the Commissioner of Internal Revenue, and they were discontinued from that date:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, June 8, 1871.

Under authority conferred by sections 2 and 3 of the act of July 20, 1868, the Commissioner of Internal Revenue, in circular No. 69, dated September 16, 1868, and again in regulations "Series 5, No. 5," dated June 7, 1870, adopted and prescribed for use in distilleries spirit-meters invented by Mr. Isaac P. Tice, the same having been adopted and prescribed by the Hon. Secretary of the Treasury on the 19th day of April, 1867, and subsequently recommended for use by the commission appointed under the joint resolution of Congress approved February 3, 1868.

It having been ascertained by experience that these meters, as a class, do not fully answer the purpose for which they were intended, their use is hereby discontinued, and all existing orders prescribing the same are hereby revoked. All meters attached to distilleries may be detached.

The meters being the property of distillers, they will be permitted to dispose of them as they may desire.

A. PLEASONTON, *Commissioner.*

X. At the time of the discontinuance set forth in the preceding finding the said Tice had on hand 14½ sets of meters. On the 12th of April, 1873, a bill for the same was presented to the Commissioner of Internal Revenue for allowance, and was allowed and approved by him as shown below, but has never been paid:

WASHINGTON, D. C., *April 12th*, 1873.

The United States Office of Internal Revenue to Isaac P. Tice, Dr.

For meters on hand—

To 6 No. 2 spirit-meters, @ 600		$3,600 00
" 8 " 3 " " @ 800		6,400 00
" 15 " 4 " " @ 1,000		15,000 00
To storage of said meters from June 8th, 1871, to April 8th, 1873, @ $400 per annum		733 33
		25,733 33

Received payment. ISAAC P. TICE.

Sworn and subscribed before me this 12th day of April, 1873.
T. I. GARDNER, *J. P.*

APRIL *12th*, 1873.

Approved for $25,733.33, (twenty-five thousand seven hundred thirty-three and $\frac{33}{100}$ dollars.)

J. W. DOUGLASS, *Commissioner.*

CONCLUSION OF LAW.

That for the reasons set forth in the opinion of the Court, the claimants' petition be dismissed.

IV.—REQUESTS OF DEFENDANTS FOR ADDITIONAL FINDINGS OF FACT AND RULINGS THEREON.

And now comes the Attorney General on behalf of the United States, and respectfully requests the Court to find the following additional facts:

I. The accounting officers of the Treasury Department refused to approve of the claim as allowed by the Commissioner of Internal Revenue or to pay the same, upon the ground that the contract was unauthorized, and that in no event was the Government liable to pay damages for a non-compliance with such contract, and that the act of Congress of January 31, 1823, prohibited payment for articles not received.

II. That there was no evidence other than the approval of the bill by the Commissioner, as specified in finding No. 10, that said meters claimed in this case were ever delivered or tendered to, or accepted by, the Government or any officer thereof, or that said meters were in existence on and after the 12th day of April, 1873.

THOMAS SIMONS, *Asst. Atty. Gen.*

Rulings of the Court on the Defendant's request for additional finding of facts.

1. The first request is refused, because the fact that the claim is not yet paid is already found by the Court, and because the reason why payment of the same was refused is immaterial.

2. The second request is refused, because it calls for the statement of evidence or absence of evidence on which the Court found the facts already found, and because it calls for a finding in the negative.

V.—OPINION OF THE COURT.

DAVIS, J., delivered the opinion of the Court, March 4, 1878:

The 15th section of the act of March 2, 1867, (14 Stat. at L., 481,) authorized the Secretary of the Treasury to adopt, procure, and prescribe a meter for ascertaining the strength and quality of spirits subject to tax. On the 27th April, 1867, the Secretary decided to adopt the Tice meter, should it prove acceptable on trial, and agreed with Tice that should it be adopted, and should the order

adopting it be revoked, Tice should be paid for all instruments, not to exceed twenty sets, completed or in process of completion at the time of the discontinuance. The meter gave satisfaction and was adopted.

On the 3d February, 1868, by joint resolution of Congress, (15 Stat. at L., 247,) all work on the construction of meters was suspended until a meter should be adopted according to law, and it was provided that no further contracts should be made by the Secretary of the Treasury for the construction of meters.

By section 2 of the act of July 20, 1868, (15 Stat. at L., 125,) the Commissioner of Internal Revenue was empowered to adopt and prescribe meters for use. On the 16th September, 1868, he adopted the Tice meter, and agreed with Tice that the sets then completed or in process of completion should be made ready for delivery at once. It is not questioned that all such sets were delivered and paid for.

From time to time changes were made in regulations and instructions concerning meters, until, on the 8th June, 1870, all previous ones were revoked by the Commissioner, except as to meters in hand or in process of construction not exceeding twenty sets, and Tice was informed that neither the Government nor any department or officer thereof was or would be responsible for or on account of any meters. The use of the Tice meter was entirely discontinued on the 8th June, 1871.

At the time of this discontinuance the claimant's intestate, Tice, had fourteen and a half sets on hand, for the value of which this suit is brought, the claimants contending that the contract made by the Secretary of the Treasury in 1867, to pay for the instruments on hand at the time of the discontinuance to the extent of twenty sets, was adopted by the Commissioner of Internal Revenue in 1868, and was made part of all the subsequent proceedings.

We are of opinion that the contract with the Secretary of the Treasury was terminated by the joint resolution of February 3, 1868. The Commissioner of Internal Revenue was authorized by the act of July 20, 1868, only to adopt and prescribe a meter, while the Secretary of the Treasury, under the act of 1867, had authority to adopt, procure and prescribe one. The Commissioner, therefore, had no authority to renew the obligation to purchase sets which might be left on hand on discontinuance of their use, and, in point of fact, he contracted no such obligation. Even had such a contract been made, however, it would have been terminated by the revocation of June 8, 1870, except as to the instruments then on hand not exceeding twenty sets, and it does not appear from the findings (because not proved as a fact) that any of the fourteen and a half sets above referred to as on hand on the 8th June, 1871, were on hand on the 8th June, 1870.

It was urged at the bar that the original agreement to indemnify

CONCLUSION OF LAW.

That for the reasons set forth in the opinion of the Court, the claimants' petition be dismissed.

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II. That there was no evidence other than the approval of the bill by the Commissioner, as specified in finding No. 10, that said meters claimed in this case were ever delivered or tendered to, or accepted by, the Government or any officer thereof, or that said meters were in existence on and after the 12th day of April, 1873.

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adopting it be revoked, Tice should be paid for all instruments, not to exceed twenty sets, completed or in process of completion at the time of the discontinuance. The meter gave satisfaction and was adopted.

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From time to time changes were made in regulations and instructions concerning meters, until, on the 8th June, 1870, all previous ones were revoked by the Commissioner, except as to meters in hand or in process of construction not exceeding twenty sets, and Tice was informed that neither the Government nor any department or officer thereof was or would be responsible for or on account of any meters. The use of the Tice meter was entirely discontinued on the 8th June, 1871.

At the time of this discontinuance the claimant's intestate, Tice, had fourteen and a half sets on hand, for the value of which this suit is brought, the claimants contending that the contract made by the Secretary of the Treasury in 1867, to pay for the instruments on hand at the time of the discontinuance to the extent of twenty sets, was adopted by the Commissioner of Internal Revenue in 1868, and was made part of all the subsequent proceedings.

We are of opinion that the contract with the Secretary of the Treasury was terminated by the joint resolution of February 3, 1868. The Commissioner of Internal Revenue was authorized by the act of July 20, 1868, only to adopt and prescribe a meter, while the Secretary of the Treasury, under the act of 1867, had authority to adopt, procure and prescribe one. The Commissioner, therefore, had no authority to renew the obligation to purchase sets which might be left on hand on discontinuance of their use, and, in point of fact, he contracted no such obligation. Even had such a contract been made, however, it would have been terminated by the revocation of June 8, 1870, except as to the instruments then on hand not exceeding twenty sets, and it does not appear from the findings (because not proved as a fact) that any of the fourteen and a half sets above referred to as on hand on the 8th June, 1871, were on hand on the 8th June, 1870.

It was urged at the bar that the original agreement to indemnify

the claimants' intestate against eventual loss was the controlling motive which induced him to invest his capital in the manufacture of articles which became valueless the moment the demand created by Government orders was withdrawn. It was argued that the continuing reference throughout the correspondence to the "twenty sets" gave him reason to believe that he was to be indemnified under the contract with the Commissioner as he was entitled to be under the contract with the Secretary, and it was said that, the expected indemnity being eventually refused, he was ruined.

These considerations may properly be addressed to the law-making power as a reason for relief; but they cannot be entertained by this Court, whose duty is to administer the law as it is.

As it appears that the claimants fail to establish their claim both in law and on the facts, the petition must be dismissed.

VI.—FINAL JUDGMENT.

At a Court of Claims held at the Capitol in the City of Washington, on the fourth day of March, A. D. 1878, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree, that the said petition of the claimants, the said Amelia Mary Tice and Henry T. Chapman, Jr., administrators of Isaac P. Tice, deceased, be dismissed.

VII.—APPLICATION FOR, AND ALLOWANCE OF, AN APPEAL.

AMELIA MARY TICE AND
HENRY T. CHAPMAN, JR.,
Administrators of Isaac P. Tice, dec'd,
vs.
THE UNITED STATES.
} No. 11,568.

From the judgment rendered in the above entitled case against the claimants on trial, the claimants by their Attorney on the fourth day of April, 1878, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. W. DOUGLASS,
Atty. for Claimants.

Filed April 4, 1878.

And now to wit, April 4, 1878, it is ordered: That the appeal be allowed as prayed for.

VIII.—CERTIFICATE.

IN THE COURT OF CLAIMS.

AMELIA MARY TICE AND
HENRY T. CHAPMAN, JR.,
Adm'rs of Isaac P. Tice, dec'd,
vs.
THE UNITED STATES.
} No. 11,568.

I, John Randolph, Assistant Clerk of the Court of Claims, do hereby certify, that the foregoing are true transcripts of the pleadings in the above entitled cause,—of the findings of fact by the Court, and the conclusion of law thereon,—of the requests of defendants for additional findings of fact and rulings thereon,—of the opinion of the Court,—of the final judgment of the Court,—of the application of the claimant for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this fifth day of December, 1878.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

IN THE

Supreme Court of the United States.

No. 1,034.

AMELIA MARY TICE AND HENRY T. CHAPMAN, Jr., ADM'RS OF ISAAC P. TICE, DECEASED,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellant,

BY

J. W. DOUGLASS,

Attorney for Appellant.

W. H. MOORE, PRINT, 511 ELEVENTH ST.

IN THE

Supreme Court of the United States.

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vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellant.

History of the case as shown by the Record.

Section 33, of the Act of July 13, 1866, (Stat. at L., Vol. 14, pp. 157 and 158,) authorized the Secretary of the Treasury to "adopt, procure and prescribe for use * * meters or other means for ascertaining the strength and quantity of spirits subject to tax," &c.

Section 15 of the Act of March 2, 1867, (Stat. at L., Vol. 14, page 48,) reiterated the language of Section 33 above cited, adding provisions in relation to the duty of distillers to apply to their respective collectors for meters, under regulations to be made by the Commissioner of Internal Revenue.

Under the authority given by the above sections, the Secretary of the Treasury determined to "adopt and prescribe for use" the meter invented by Isaac P. Tice, the decedent in this case, and notified Tice to that effect through the official letter of the Commissioner of Internal

Revenue, dated at the Treasury Department, April 17, 1867, and approved by the Secretary April 18, 1867. This letter provided, among other conditions, a reservation of the right of the Secretary "at any time * * to revoke the order adopting the meter, and to discontinue their manufacture on the part of the Government," with the further condition that when the Government did revoke and discontinue proceedings, Tice was to be paid for all instruments which were completed, or in process of completion, at the time of revocation; provided, that at no time should there be "more than twenty sets in process of manufacture at any one time;" and that three competent persons should be selected to examine and determine what the prices should be for the meters. (Record, pages 2 and 3.)

The account has not yet been paid. (Record, page 20.)

In pursuance of the second paragraph of the Department letter to Mr. Tice of April 17, 1867, the Commissioner of Internal Revenue, by his official regulation "Special No. 54," dated April 19, 1867, publicly announced the adoption of the meter invented by Mr. Tice; and on the 26th of April, 1867, the Commissioner promulgated the official regulations, "Circular No. 63," for the instruction and guidance of all officers and distillers in the use of the meters. (Record, pages 11 and 12.)

On the 3d of Feby., 1868, Congress by Joint Resolution provided for a commission of five persons, who, in conjunction with certain experts, were "carefully to examine all meters;" and pending this examination, "all work in the construction of meters, under direction of the Treasury Department," was to be "suspended." (Stat. at L., pages 246 and 7, Vol. 15.) The commission instituted by the Joint Resolution made the examination required and reported in favor of the use of the meter invented by Mr. Tice, (Record, page 14.)

The Act of July 20, 1868, (Stat. at L., Sec. 2, Vol. 15, page 125,) transferred the whole matter of meters into the

official care of the Commissioner of Internal Revenue; and he, on the 16th of Sept., 1868, (Record, pages 12 and 13,) by his official letter to Mr. Tice removed the suspension of proceedings under the Joint Resolution, and informed him of the continued adoption of the meters, ordering work to be recommenced on the meters on hand, and the manufacture of others to the number of 500 in all, "to be proceeded with as rapidly as possible;" also reserving the right to revoke and discontinue the use of the meters; and repeating the provision of the original contract that "not more than twenty sets should be in process of construction at one time." This official letter contained the schedule of prices fixed for the meters as determined by the "three persons" provided for in the Department letter of April 17, 1867. In further resumption of operations under the meter system the Commissioner, on the 16th of Sept., 1868, issued his official regulations, "Circular No. 69," giving notice of the resumed use of the meters; the schedule of prices as determined under the original contract; the method of attachment to distilleries, &c., &c.

On the 8th of June, 1870, the Commissioner, by his official letter addressed to Mr. Tice, advised him of the promulgation of new regulations prescribing the use of his meters and the revocation of prior letters and regulations, *except* so much of the letter of September, 16, 1868, as provided in relation "to meters heretofore delivered, and also those you may now have on hand, or in process of construction, not exceeding twenty sets." (Record, page 18.)

On the day previous, June 7, 1870, the Commissioner, by his official letter addressed "to all collectors," and by his official regulation, "series 5, No. 5," had re-announced the use of the Tice meters with improvements, subject to the provision of the original contract as to the "twenty sets," which were to be paid for upon the final revocation and discontinuance of the meter system. (Record, pages 17 and 18.)

The use of the meters continued under these regulations until the 8th of June, 1871, when the Commissioner, by his official regulation, "Circular No. 96," gave public notice of the final discontinuance of the system of meters, revoking all orders prescribing their use. (Record, page 19.)

On the 12th of April, 1873, Mr. Tice presented his account "for meters on hand" at the date of final discontinuance, (June 8, 1871,) with an item for storage, ($733.33,) the total amount being $25,733.33. This account was approved by the Commissioner of Internal Revenue. (Record, page 19.)

I.

The power given to the Secretary of the Treasury by sections 33 of the act of July 13, 1866, and 15 of the act of March 2, 1867, and section 2 of the act of July 20, 1868, transfering the subject to the Commissioner of Internal Revenue, constituted a full and complete authority to contract for the manufacture of meters, subject to such prudent conditions as the department and the person contracting might agree upon. (See the above sections, Stat. at L.)

II.

The official communications to Mr. Tice, by the Secretary and the Commissioner, and his acceptance of their terms by the expenditure of labor and money thereunder, constituted a binding contract between the Government and Tice that will be enforced by this Court. (See record, *passim*, 8 Wall., 358; 8 Wall., 77.)

III.

"Circular No. 96," promulgated by the Commissioner of Internal Revenue, June 8, 1871, constituted that complete and final revocation of "the adoption of the meter" and order "of discontinuance of proceedings" contemplated and provided for by the "fourth" condition of the

Department letter of April 17, 1867; in view of which the Department contracted to pay Tice, at an agreed price, for all completed or uncompleted instruments on hand at the time of final discontinuance, not to exceed "twenty sets" in all; repeating this condition in the Department letters of September 16, 1868, and June 8, 1870, and "Circular to all Collectors," dated June 7, 1870. The sum of the prices of the meters on hand at the time of the final discontinuance was of the nature of liquidated damages and is due in full. (7 Wall., 688; 8 Wall., 38; Chitty on Contracts, 759, 761, 763; 71 Pa., 180; 11 Barb. N. Y., 127; 5 Sandf. N. Y., 640; Story on Contracts, Sec. 1021, page 696.)

IV.

The presentation by Tice on the 12th of April, 1873 of his accounts for meters "on hand" June 8, 1871, the date of discontinuance, and the approval of account by the Commissioner of Internal Revenue, is conclusive as to the interpretation of the contract, being by the parties themselves, and makes a *prima facie* case for the claimants, entitling them to judgment for the full amount ($25,000) claimed. (Record, page 26; U. P. R. R. Co. case, 10 C. Cl., 548; Mrs. Alexander's case, 4 C. Cl., 218; Parish case, 2 C. Cl., 341.)

V.

The Court below erred in its construction of the Joint Resolution of February 3, 1868, when they held that "it was provided that no further contracts should be made by the Secretary of the Treasury for the construction of meters." The language of the resolution was that "*in the meantime* no further contract for meters shall be made by the Secretary," &c. The meter had been submitted to a scientific commission for examination and report, and very properly during the period of their consideration of its merits, the work under the old contract was "suspended," and new contracts in the *meantime* not allowed. By the very terms of this resolution whenever the scien-

tific commission reported (which they did favorably to the meter,) and Congress said to the Commissioner, or the Secretary, go ahead again with the system, which was said by the Act of July 20, 1868, all the rights and duties of both parties under the old contract were again in full and active force. Any other interpretation than this robs the words "*suspended*" and "*in the meantime*" of their most obvious meaning and common acceptation.

The Court below held that—"We are of opinion that the contract with the Secretary of the Treasury was terminated by the joint resolution of February 3, 1868." The joint resolution itself says that the contract was merely "*suspended*" and by consequence *not* "terminated." This error was a vital one. The suspension being removed, the whole contract matter passed into the hands of the Commissioner of Internal Revenue by the Act of July 20, 1868, and started again just where it had been suspended, to give a body of experts an opportunity to examine the instrument and Congress to consider their report. As said before the experts reported favorably, and Congress by its enactment took off the suspension and instructed the Commissioner to resume operations.

VI.

The action of the Commissioner after the Act of July 20, 1868, coincides exactly with the above point. On the 16th of September, 1868, he notified Mr. Tice that his meter was adopted and prescribed for use in distilleries and that "the one hundred and seventeen meters *now finished* will be made ready," &c, This language of necessity implies an existing contract between the parties and course of dealing, the one of course that had been temporarily "suspended." And then the same communication goes on to order that "the manufacture of others, to the number of five hundred (500) in all, is to be proceeded with as rapidly as possible, *and thereafter not more than twenty sets* are to be in process of construction at one time,

unless a greater number is directed by the Commissioner of Internal Revenue." It will be remembered that this was the language of the *first letter* to Mr. Tice after the Joint Resolution and the Act of July 20, 1868, and clearly recognized an existing contract between Mr. Tice and the United States.

Again, this letter refers to "twenty sets" as being the limit of the number to be in process of manufacture, &c. This language has no meaning unless the old contract is referred to (April 17, 1867;) and if the old contract was terminated, and the Act of July 20, 1868, did not authorize that feature in a new contract, as held by the Court below, then the language was only a snare for Mr. Tice, inducing him to invest his labor and capital to the amount of over $300,000, under promise of indemnification when none was intended. Surely the Government of the United States will not make haste, through its judicial authority, to overturn the clearest use of the most common terms deliberately inveigling a citizen into a position, where he must inevitably lose a large sum of money.

VII.

The letter of the Commissioner of June 8, 1870, (Record, page 5,) expressly recognized and reiterated the liability of the United States in relation to the provision about "twenty sets." In short, every communication addressed to Mr. Tice by the Department, whenever new regulations were issued or improved meters recommended, referred to the "twenty sets'" provision as binding between the parties.

VIII.

The Court below erred in holding that the action of the Commissioner on June 8, 1870, was a "termination" of the use of the meters such as was contemplated by the original contract, and the meters on hand then (June 8, 1870,) were, if any, the ones to be paid for.

By reference to the "fourth" consideration of the original contract, (Record, p. 2,) it will be seen that the contingency in which Mr. Tice was to become entitled to the price of "twenty sets," was when the Department chose "to revoke the order adopting the meter." The order *adopting the meter system* was never revoked until the 8th of June, 1871. (Record, page 19.) The order of June 8, 1870, shows on its face that instead of the "adoption of the meter" being revoked and the system discontinued, it was simply the change from the use of the "automatic meter" of Mr. Tice to the use of the "sample meter" of Mr. Tice, (Record, page 17, Series 5, No. 5,) and contains full instructions to the officers and distillers for their *future use*. The Court below was in error palpably in this, on the face of the Record. The Department, in determining to use Mr. Tice's "sample meter" thereafter instead of the "automatic meter" as theretofore, was simply availing itself of a reserved right in the original contract. (Record, page 10, and first two lines of "fourth" provision.)

If the final revocation of the use of the meter did not occur until the 8th of June, 1871, then Mr. Tice could not have demanded before that date the price of the "sets" on hand, not to exceed "twenty.". In another part of its decision the Court below held that "the use of the Tice meter was entirely discontinued on the 8th June, 1871." (Record, page 21.) The proof was clear, that on the "8th of June, 1871," the 14½ sets, valued by agreement at $25,000, were on hand.

IX.

The Court below erred in holding that the "Commissioner of Internal Revenue was authorized by the Act of July 20, 1868, only to *adopt and prescribe* a meter, while the Secretary of the Treasury, under the Act of 1867, had authority to *adopt, procure, and prescribe one*," and that "*the Commissioner, therefore, had no authority to renew the obligation to purchase sets which might be left on hand on discon-*

tinuance of their use." It is true that the word "procure" was omitted from the Act of 1868, leaving the words "adopt and prescribe" alone. The omission of the word "procure" was simply because it had never been operative under the old Act, (1867.) By reference to the regulation issued from the Treasury Department on the 26th of April, 1867, (Record, page 11,) it will be seen that the Department did not understand that they had undertaken to "procure" the meters under the Act of 1867 and the original contract. The language of the concluding lines of the first paragraph of that regulation is—"under this authority the Secretary has *adopted and prescribed* for use the meter, and system of attaching the same, invented by Mr. Isaac P. Tice, of New York." This is conclusive as to what the Department did under the first law and the early regulations under it. The Department announced to the whole world that they had simply "adopted and prescribed" the Tice meter, not attempting to "procure" them for use, but leaving that to be done by the distiller under the regulations. The language of the second paragraph of the same regulation (Record, page 12) is also conclusive to the same effect, as follows: "And the same shall be furnished and attached to the distillery at the expense of the distiller, whose duty it shall be to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment, in accordance with the regulations of the Commissioner of Internal Revenue." Practically, then, under the action of the Department, the terms of the two Acts (1867 and 1868) were precisely alike, and what *was done* under the one *might well be done* under the other. This rendering of the law and regulations at once makes intelligible and reputable the constant reference to the "twenty sets'" provision in the official notifications to Mr. Tice under both Acts, and until the discontinuance of the entire system.

The approval of the Commissioner of Internal Revenue of Mr. Tice's bill for the 14½ sets "on hand" at the date of

discontinuance (Record, pages 6 and 19) was therefore but simple justice to the then claimant, and in strict consonance to the course of dealing between the parties, as both understood the law and the contract thereunder. To change the understanding of these things now to the overwhelming injury of the claimants, when the Government has had all the benefit under her part of the contract until she chose to discontinue it; adopting a new and unheard-of reading of the law, contract and regulations, after Tice is dead, (having been previously bankrupted by the meter contract,) and his widow and orphans are left to suffer alone the baseness of such changed treatment, would seem to be too unjust and arbitrary for any civilized Government to propose.

X.

The provision to pay Tice for all instruments on hand at the time of final discontinuance of the meter system, not exceeding "twenty sets," at the agreed valuation (Record, p. 13), was wise and fair as between the parties, and a proper protection incidentally to the distilling interests of the country. As between the parties, Mr. Tice was taking upon himself the expense of several hundred thousand dollars, at a risk of revocation at any time, with indemnity promised only as to "twenty sets." He allowed a committee of three to fix the price upon his meters, (which were patented,) two of the three chosen by the Department. The moment the meter system was revoked, the meter was valueless as an invention, being applied solely to distillery purposes. When revoked, the meters and materials on hand were worth merely what they would bring as old iron or brass. Tice had to take the risk of collections entirely, for when the collectors retained the money price he was left by the Department to get it as best he could. This was Tice's burden.

On the other hand the Government by the arrangement escaped all expenses of factories, to be built or rented; all

cost of materials and skilled labor; all advancement of capital; all insurance; and in short all of the thousand and one expenses in connection with the starting and maintaining of a large manufactory; and the loss inevitable at the conclusion of the enterprise.

Can it be controverted that the single provision about the "twenty sets" was but a small and altogether proper consideration to Tice?

Contracts to share the loss by both parties to some extent, at the end of a business undertaking involving large outlay and risk by the one party, are common and legal and equitable. Such contracts are of daily occurrence between citizens, who are held by the Courts to a faithful compliance with their terms. There is no reason why the Government of the United States should not observe equal faith with her contractors.

The power in the Department to "adopt and prescribe" a meter implied all of the ordinary business methods and incidents to a complete exercise of the power. And it was a serious duty, too, for the Department to see that these instruments were furnished to the distillers at a fair price. Tice having a patent could have fixed his own price, if not restrained by contract, and the distillers being compelled by law to purchase the meters when adopted or to stop business entirely and at once, would have been completely at the mercy of the patentee (Tice). This public calamity was averted by the contract, and certainly warranted, as a matter of public policy, the contract made.

How could the Department "adopt and prescribe" Mr. Tice's meter except by arrangement (contract) with him? It was his patent, and he alone could use, or authorize others to use it. The authority to "adopt and prescribe" the use of another's property, necessarily implies the power to contract with him about it, and with that the power to employ any of the usual considerations known to the business world. A provision to share the loss of stock on hand

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BRIEF FOR THE UNITED STATES.

I have carefully considered the above record, and also the brief filed in this court by the learned counsel for the appellants, and beg leave to submit that the opinion delivered in this cause by the learned court below (Record, 20, &c.) presents plain and unanswerable reasons for their action in dismissing the petition; and, consequently, for now affirming that judgment, especially in these respects:

1. That after the legislation of 1868, referred to in the opinion, the Commissioner of Internal Revenue had no authority to *procure*, but only to *adopt* and *prescribe* meters.

2. That, feeling perhaps that the Department by its language to Tice may have misled him in this respect, (Record, p. 22, top,) the Commissioner was at pains, on the 8th of June, 1870, to give him such warning as secured him from all loss as to *uncompleted*, &c., *meters*, at the same time that it relieved the Department from the appearance of paying for articles which were not to

be used. The expressions previously used as to *uncompleted*, &c., *meters* were by that warning to apply *as of the 8th of June*, 1870, whilst the use of the Tice meter was to continue *provisionally*. That provisional use was in fact continued for a year thereafter, but no authority was given to Tice *to commence new work* subsequently to the 8th of June, 1870.

S. T. PHILLIPS,
Solicitor General.